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Department of the Treasury  
Washington, DC 20224

Third Party Communication: None  
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Person To Contact: \_\_\_\_\_, ID No. \_\_\_\_\_

Telephone Number:

Refer Reply To:  
CC:CORP:BO5  
PLR-123299-07

Date:  
January 02, 2008

In Re:

### Legend

Taxpayer =

Holdings =

$$\text{Lossco} =$$
$$LP =$$

LLC 1 =

LLC 2 =

LLC 3 =

Supplier =

Corporation A =

Bank =

Buyer =

Acquisition G.P. =

Director =

State A =

Business A =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

a =

b =

c =

d =

e =

f =

g =

h =

i =

j =

k =

l =

m =

n =

o =

p =

q =

r =

s =

t =

u =

v =

w =

x =

y =

z =

aa =

bb =

cc =

dd =

ee =

ff =

gg =

hh =

Dear :

This letter responds to your May 10, 2007 letter requesting a ruling under section 382(l)(1). We received additional information on August 10, 2007 and December 21, 2007. The information you submitted for our consideration is summarized below. Unless otherwise indicated, references herein to code sections and regulations are to the applicable Internal Revenue Code and Income Tax Regulations.

The rulings contained in this letter are based on facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the materials submitted in support of the request for rulings. Verification of the information, representations, and other data may be required as part of the audit process.

#### FACTS

In Year 1, LP, a partnership, acquired a majority of the stock of Lossco. Lossco was a State A corporation engaged in Business A. From the time of the acquisition until Date 1, Lossco was the common parent of an affiliated group of corporations that filed a consolidated federal income tax return. During this period, LP held between a percent and b percent of the equity of Lossco through its wholly-owned limited liability company, LLC 3. From Date 5 forward, LLC 3 was a partnership c percent owned by LP for U.S. federal income tax purposes. Supplier owned approximately d percent of the equity in Lossco and the remaining e percent was owned by various parties during this period.

LP owned f percent of the membership interests in LLC 2, a State A limited liability company. Supplier owned the remaining g percent of LLC 2. LLC 2 was treated as a

partnership for U.S. federal income tax purposes. LP also wholly-owned LLC 1, a State A limited liability company that was disregarded as an entity separate from LP for U.S. federal income tax purposes.

On Date 2, Lossco entered into a credit agreement (“Credit Agreement”) with Bank that provided for \$h, \$i of term loans and no more than \$h under a revolving credit facility (collectively, the “Senior Loans”). Bank acted as an administrative agent for a syndicated group of lending banks (“Lenders”). Lossco granted first priority liens on substantially all of its assets to secure the loans and other extensions of credit made under the Credit Agreement. The Credit Agreement prohibited Lossco or any of its subsidiaries from creating or incurring any debt other than that allowed by the Credit Agreement. The Credit Agreement stated that any Lender could sell one or more participating interests in the loans.

On Date 3, Lossco issued notes in the aggregate principal amount of \$j (the “Notes”) pursuant to an indenture (“Note Indenture”). The Credit Agreement allowed for Lossco’s issuance of the Notes. The Notes were unsecured and were subordinated in right of payment to indebtedness under the Credit Agreement. The Note Indenture allowed Lossco to borrow additional sums, up to \$k, under the Credit Agreement, but otherwise limited Lossco’s ability to issue debt senior to the Notes. The Notes ranked pari passu with Lossco’s obligations to its trade creditors.

Lossco struggled financially and was balance-sheet insolvent for the quarter ending Date 4. On Date 6, Lossco and Bank entered into an amendment to the Credit Agreement whereby Bank would lend Lossco an additional \$l (the “Date 6 Loan”) if LP (or an affiliate) would enter into an agreement to purchase a 100 percent undivided participation interest in the Date 6 Loan (“Date 6 Participation Agreement”). Bank would not lend the \$l to Lossco until Bank received the cash payment from LP (or its affiliate).

On Date 6, LLC 2 and Bank entered into the Date 6 Participation Agreement, LLC 2 purchased the participation interest from Bank, and Bank lent \$l to Lossco. At such time, LLC 2 did not own any stock of Lossco. LLC 2 had almost no rights under the Date 6 Participation Agreement other than to be paid out of funds or other distributions received by Bank after Bank had been fully paid with respect to the Senior Loans. LLC 2 had no privity with Lossco, no remedies as a creditor against Lossco, and no ability to amend the terms of the Credit Agreement with respect to any loans, including the Date 6 Loan. The Date 6 Loan was made subordinate to the Senior Loans. The Date 6 Participation Agreement stated that when Bank was fully satisfied with respect to the Senior Loans, Bank would cause to be distributed to the participant any payment relating to the principal of the Date 6 Loan.

On Date 7, Lossco and Bank entered into another amendment to the Credit Agreement whereby Bank would lend Lossco up to an additional \$m (the “Date 7 Loan”) if LP (or an affiliate) would enter into a participation agreement to purchase a 100 percent undivided participation interest in the Date 7 Loan (“Date 7 Participation

Agreement"). Bank would not lend the \$m to Lossco until Bank received the cash payment from LP (or its affiliate). The terms of the Date 7 Participation Agreement were substantially the same as those in the Date 6 Participation Agreement. On Date 7, LLC 2 purchased the participation interest from Bank, and Bank lent approximately \$m to Lossco.

On Date 8, Lossco and Bank entered into another amendment to the Credit Agreement whereby Bank would lend Lossco an additional \$n (later increased to \$o) if LP (or an affiliate) would enter into a participation agreement to purchase a 100 percent undivided interest in the Date 8 Loan ("Date 8 Participation Agreement"). The terms of the Date 8 Participation Agreement were substantially the same as the Date 6 and Date 7 Participation Agreements. On Date 8, LLC 1 purchased the participation interest from Bank, and Bank lent the funds to Lossco. In connection with the Date 6, Date 7 and Date 8 transactions, Lossco issued warrants to LP (or an affiliate) which provided the right to purchase Lossco stock at \$p per share.

On Date 9, Lossco filed a voluntary petition for bankruptcy under Chapter 11 of Title 11 of the U.S. Bankruptcy Code. At such time, q percent of Lossco's stock was held by LLC 3, r percent was held by Supplier, and Corporation A and Director each owned approximately s percent. The amount of the Date 6, Date 7, and Date 8 Loans (including interest) outstanding at the time was \$t, \$u, and \$v respectively. Bank submitted claims with respect to all amounts owed by Lossco under the Credit Agreement.

Lossco's creditors' and shareholders' claims were categorized in the bankruptcy. The Class 2 Claimant was Bank, as the holder of the Senior Loans. The Class 3 Claimant was also Bank, as holder of the right to payment under the Credit Agreement for the Date 6, Date 7 and Date 8 Loans. The Class 3 Claim was for approximately \$w. The Class 4 Claimant held the right to payment of certain other secured claims. The Class 5 Claimants were unsecured creditors, including the holders of Lossco's Notes. The Class 6 Claimants were certain other unsecured creditors. The Class 7 Claimants were Lossco's shareholders.

As holder of the Class 2 and Class 3 Claims, Bank stood to collect in advance of the Class 4, 5, 6 and 7 Claimants. The holders of Class 7 claims would not receive payment on their equity interests until all other claims were satisfied in full. LLC 3 and Lossco's other shareholders stood to recover nothing with respect to their shares and did not have a vote in the bankruptcy reorganization plan.

Certain of Lossco's unsecured creditors ("Unsecured Creditors") filed a motion with the Bankruptcy Court asking for permission to bring suit against LP, LLC 1, LLC 2, LLC 3 and Bank to among other things, subordinate the Class 3 Claims to the claims of the Unsecured Creditors and recharacterize the Class 3 Claims as equity. The Unsecured Creditors claimed that the Date 6, Date 7 and Date 8 funding transactions were, in substance, capital contributions. The Unsecured Creditors stated that if the Date 6,

Date 7 and Date 8 Loans were not recharacterized, the Unsecured Creditors would likely get little or no distribution in the bankruptcy reorganization. The Unsecured Creditors alleged that Lossco borrowed the Date 6, Date 7 and Date 8 funds at a time when it was in the zone of insolvency, over-leveraged and undercapitalized and that Lossco's Board of Directors did not properly consider the impact of the transactions on other creditors.

The Unsecured Creditors argued that the parties disguised the equity contributions by papering each contribution as (i) a loan by Bank to Lossco under the pre-existing Credit Agreement, and (ii) a purchase of a participation interest in the loan by LP (or an affiliate). The Unsecured Creditors claimed Lossco's shareholders disguised these equity contributions so they could gain priority in payment over Lossco's Unsecured Creditors. The Unsecured Creditors also argued that Lossco's issuance of warrants, giving LP (or its affiliate) the right to purchase shares of Lossco common stock at \$p per share, further demonstrates that the funding was an investment because the warrants provided LP (or its affiliate) with equity upside. The parties settled the matters raised by the Unsecured Creditors before the Bankruptcy Court had to rule.

On Date 1, the effective date of the bankruptcy reorganization ("Effective Date"):

- All the Lossco common stock (including all options, warrants, etc.) was cancelled, and the holders of such interests received no consideration in exchange therefore;
- The Credit Agreement was terminated. The Class 2 Claimant received cash in full consideration of the Class 2 Claims.
- The Class 4 and Class 6 Claimants received payment or other treatment specified in the reorganization plan.

Holdings, a State A corporation had been previously formed to hold all of the stock of Lossco. As a result of the plan of reorganization on the Effective Date, a total of x shares of Holdings' common stock was allocated between the Class 3 and Class 5 Claimants consistent with their economic rights under the plan of reorganization:

- The Class 3 Claimant, Bank, received y shares of Holdings common stock, which represented z percent of Holding's common stock immediately after the Effective Date.
- The Class 5 Claimants received aa shares of Holdings common stock which represented bb percent of Holding's common stock immediately after the Effective Date.

Bank, in keeping with the terms of the Participation Agreements, caused the y shares of Holdings common stock it was entitled to receive with respect to the Class 3 Claims to

be allocated and issued directly in the names of the participants: cc shares to LLC 1 and dd shares to LLC 2. As a result of the exchange of claims for equity pursuant to the bankruptcy plan, Lossco realized cancellation of indebtedness income in the amount of approximately \$ee (including accrued but unpaid interest) which was excluded from income under section 108.

Approximately ff months after the Effective Date, pursuant to an agreement with Buyer, Lossco merged with and into Holdings, with Holdings surviving. Holdings changed its name to (New) Lossco. On Date 10, Buyer acquired all of the (New) Lossco stock in a taxable transaction. The acquisition of (New) Lossco by Buyer was accomplished by means of a taxable merger of Acquisition G.P. with and into New Lossco, with New Lossco surviving. The shareholders of New Lossco received cash in the aggregate amount of \$gg. Buyer's purchase of (New) Lossco resulted in an ownership change within the meaning of section 382.

### REPRESENTATIONS

1. Taxpayer represents that on the Effective Date, cc shares of Holdings stock were directly issued in the name of LLC 1 and dd shares of Holdings stock were issued in the name of LLC 2.
2. Taxpayer represents that Lossco's bankruptcy reorganization did not result in a section 382 ownership change of Lossco because at the start of the Effective Date LP's partners indirectly owned g percent of Lossco and on the Effective Date indirectly reacquired z percent of Lossco.
3. Taxpayer represents that Lossco reduced its net operating loss carryovers by the full amount of cancellation of indebtedness income.
4. Taxpayer represents that Lossco's ownership had not changed within the meaning of section 382 in the three year period ending immediately prior to the date of Buyer's acquisition of (New) Lossco.
5. Taxpayer represents that the approximate aggregate value of the y shares of Holdings common stock received by LLC 1 and LLC 2 on the Effective Date was \$hh.

### LAW

Section 382(a) provides that the amount of taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed the section 382 limitation for such year.

Section 382(e) provides that the value of the old loss corporation is the value of the stock of such corporation immediately before the ownership change.



Section 382(l)(1)(A) provides that any capital contribution to the old loss corporation is not taken into account for purposes of section 382 if it is part of a plan a principal purpose of which is to avoid or increase any limitation under this section. Section 382(l)(1)(B) provides that any capital contribution made within the two-year period ending on the change date shall, except as provided in regulations, be treated as part of such a plan.

### RULINGS

Section 382(l)(1) does not apply to treat the conversion of \$hh of the Date 6, Date 7, and Date 8 Loans into equity or the forgiveness of the remainder of the outstanding balance of such loans as a capital contribution received by Lossco as part of a plan a principal purpose of which was to avoid or increase the section 382 limitation. Therefore, (New) Lossco is not required to disregard the amount of the equity created by such conversion or forgiveness for purposes of determining the section 382 limitation with respect to the ownership change resulting from the acquisition of (New) Lossco by Buyer.

### CAVEATS

No opinion is expressed about the tax treatment of the completed transaction described above under other provisions of the Code and regulations or the tax treatment of any condition existing at the time of, or effects resulting from, the completed transaction that is not specifically covered by the above rulings. In particular, no opinion is expressed regarding whether the funding from LLC 2 and LLC 1 to Bank and from Bank to Lossco pursuant to the Credit Agreement and participation agreements constitutes direct loans or direct capital contributions from the participants to Lossco.

### PROCEDURAL STATEMENTS

This letter ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent. A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

In accordance with the power of attorney on file in this office, a copy of this ruling letter will be sent to your authorized representative.

Sincerely,

Marlene P. Oppenheim  
Senior Counsel, Branch 5  
Associate Chief Counsel (Corporate)